In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-126

BARRY SIGAL, a/k/a BARRY EDWARDS, a/k/a DAVID ALLEN SPECTOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that the court erred in refusing to suppress evidence discovered and seized in warrantless searches, and that a statement made to arresting agents, before petitioner was advised of his *Miranda* rights, was inadmissible and the product of duress.

After a jury-waived trial in the United States District Court for the District of Kansas, petitioner was convicted of unlawfully possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. C).

The evidence showed that when, on July 9, 1972, petitioner and one Mr. Stewart crossed the border into the United States from Mexico, customs agents discovered a hashish pipe in Stewart's suitcase and a marijuana

cigarette in his sock. The agents also found a map hidden in petitioner's sock. When asked to empty his pockets, petitioner tried to "palm" a key bearing a tag marked "N427OT" (Tr. 16-23).[1] Petitioner and Stewart gave non-existent addresses (Tr. 42-43).

Agent Weatherman of the Bureau of Customs then went to the El Paso International Airport where he located a Piper Cherokee-6 airplane with the number N427OT. He looked inside the airplane and noted that four of the six seats had been removed and approximately twenty flattened cardboard boxes and two sealed boxes occupied the seating space (Tr. 24-25). At 2:30 a.m. on July 11th, the aircraft departed. It was followed by customs agents to Willcox, Arizona, where it landed at 4:20 a.m. The customs agents circled the Willcox airport for an hour before landing; by the time they landed at 5:20 a.m., the aircraft had departed (Tr. 27-30). The plane next landed at Holbrook, Arizona, at 10:00 o'clock a.m. (Tr. 31).

The following day petitioner and Stewart flew to Long Beach, California (Tr. 40-44).

Approximately one week later, customs agents observed numerous boxes being loaded onto petitioner's airplane at Los Angeles (Tr. 47-48). Customs aircraft followed petitioner's airplane to Grants, New Mexico (Tr. 49). After an hour of aerial surveillance, the customs aircraft landed. Agent Weatherman learned that the pilot had gone to a motel. Agent Weatherman then looked

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[1]"Tr." identifies the one-volume transcript of the arraignment and hearing on a motion to suppress of February 16, 1973. "Tr. T." identifies the transcript of the court trial on July 13, 1973. The case was submitted to the trial court after petitioner waived his right to jury trial. The case was tried on the basis of various stipulations, which included the right of the trial court to consider the greater part of the testimony given at the suppression hearing. No further evidence was presented by either side.

inside the aircraft and saw numerous large cardboard boxes. On closer examination, he detected the odor of marijuana coming from the aircraft (Tr. 50-51). Weatherman found the door to the luggage compartment unlocked and opened it. Inside he found a sealed cardboard box and a travel bag. The box contained more than twenty pounds of marijuana. The travel bag contained personal effects and plastic bags of marijuana (Tr. 51-52). No search warrant had been obtained.

The next morning, July 24th, petitioner flew to Liberal, Kansas (Tr. 52-54). Weatherman followed. Upon landing, Weatherman walked toward petitioner, calling his name. Weatherman identified himself as a customs agent and asked petitioner what he had in his airplane. Petitioner replied "grass". A second agent placed petitioner under arrest and advised him of his constitutional rights (Tr. 54). A warrantless search of the plane was then conducted and 426 pounds of marijuana was seized (Tr. 56-57; Tr. T. 14).

1. Petitioner contends that the search and seizure of the marijuana at Liberal, Kansas, was the product of an illegal search at Grants, New Mexico, and that the trial court therefore erred in denying a motion to suppress (Pet. 7-29). As the court below correctly held, however, the search of petitioner's airplane at Grants, New Mexico,[2] "was based on probable cause under exigent circumstances which obviated any necessity to obtain a search warrant"

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[2]Petitioner's suggestion (Pet. 7, 8, 9, 29) that the court below treated the search of an airplane as potentially less intrusive upon Fourth Amendment rights than the search of an automobile is unfounded. The court of appeals found that both probable cause and exigent circumstances must be present for a lawful warrantless search. This is the same standard which would have applied if petitioner had been driving an automobile.

(Pet. App. C, 6a).[3] *Chambers* v. *Maroney*, 399 U.S. 42; *Carroll* v. *United States*, 267 U.S. 132; *United States* v. *Pollard*, 466 F. 2d 1 (C.A. 10), certiorari denied, 409 U.S. 1127.

Agent Weatherman's probable cause to believe petitioner's aircraft contained marijuana was based upon several facts, including the suspicious circumstances under which petitioner entered the United States on July 9, 1972, the unusual contents of petitioner's aircraft, and the odor of marijuana from petitioner's aircraft.[4] *Carroll* v. *United States, supra.*

Several exigent circumstances prevented the custom agents from obtaining a search warrant by the time they had probable cause to believe that the aircraft contained marijuana. Petitioner could depart from Grants immediately. He had several times previously departed from locations in the middle of the night. Moreover, because the agents could not be certain that petitioner was acting alone, it was possible that someone other than petitioner could remove the plane from the area. Finally, the agents could not be certain that they could continue to pursue petitioner. They might lose track of him, or he might fly

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[3]Petitioner's claim that the airplane was "immobile" at the time of the initial search, and therefore not within an exception to the requirement of a search warrant (Pet. 8, 9, 17), is unfounded, since this Court has characterized "mobility" as "readily movable" and "movable". *Cardwell* v. *Lewis*, No. 72-1603, decided June 17, 1974, slip op., pp. 5-6. Clearly the airplane in question was a "mobile vehicle."

[4]Petitioner's contention that the decision of the court below, finding probable cause for the initial search, conflicts with the ruling of this Court in *Taylor* v. *United States*, 286 U.S. 1 (Pet. 10-11, 29), is misconceived. The lack of probable cause in *Taylor* was attributable to the searching officer's reliance upon an odor alone. In petitioner's case the odor of marijuana was but one of a number of elements establishing probable cause.

across the border to Mexico. Agent Weatherman's search on July 23, 1972, was therefore reasonable under exigent circumstances. *Chambers* v. *Maroney, supra;*[5] *Carroll* v. *United States, supra; Cardwell* v. *Lewis,* No. 72-1603, decided June 17, 1974. Accordingly, what thereafter occurred at the airport in Liberal, Kansas, was not the fruit of any tree that had been poisoned in Grants, New Mexico.

We recognized, however, that the question whether police officers, having probable cause to believe that a vehicle contains contraband, can properly conduct a warrantless search of the vehicle, is one in which the circuits are in conflict. See our Petition for a Writ of Certiorari in *United States* v. *Bradshaw*, No. 73-1809.

2. Petitioner contends that the trial court erred in failing to suppress his one-word statement "grass" which was made before petitioner was informed of his *Miranda* rights and allegedly made under duress (Pet. 26-29).

Petitioner bases his allegation of duress upon testimony that the arresting agents approached petitioner with drawn weapons (Tr. 141-142, 153, 156-157). Nothing in the record, however, indicates that petitioner's statement was induced by the presence of the drawn weapons. Moreover, although petitioner had been halted, the trappings of official custody were minimal. Petitioner stood on a public airstrip, with several airport employees nearby, and he had not yet been placed under arrest (Tr. 54).

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[5]Petitioner's reliance upon *United States* v. *Payne*, 429 F. 2d 169 (C.A. 9) (noted by this Court in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 462, n.19) is misplaced. In *Payne* law enforcement officials had affirmative knowledge that those in control of the subject vehicle intended to remain at the same location. No similar assurance was entertained by the agents in the instant case.

Even assuming *arguendo* that the admission of petitioner's statement may have been error, the error was harmless beyond a reasonable doubt. As the court of appeals stated, "Independent of this one word utterance is overwhelming evidence that Sigal did in fact possess 445 pounds of marijuana. And the quantity involved permits the inference that he possessed the marijuana with an intent to distribute it. *United States* v. *King*, 485 F. 2d 353 (10th Cir. 1973)"[6] (Pet. App. C, 14a).

3. Because the Fourth Amendment issue is raised by the government's petition for certiorari in *Bradshaw, supra,* we suggest that the appropriate course here is for the Court to hold this petition for action consistent with the Court's disposition in *Bradshaw.*

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[6]Petitioner's suggestion that the trial court did not infer intent from the quantity of marijuana is unsupported by the record. The trial court stated:

> He wasn't transporting it for some innocent purpose. No one planted it in the plane, in other words. And, the very fact that he possessed this amount, and all of his activities, indicate to the Court that the defendant did intend to distribute that quantity of marijuana. It would take him a long time to smoke that much personally. The only inference is that he had it for distribution in one way or another. And, I don't have any problem in finding beyond a reasonable doubt from the evidence before me at this point that the defendant is guilty of count three of the indictment, of possessing the marijuana with intent to distribute. And, I so find the defendant guilty of count three. [Tr. T. 17.]